to enter into the agreement, the fiction of identity of mind is incompatible with the fact of prohibition, and the liabilities of the undisclosed principal, like that of a disclosed principal whose agent has exceeded his authority, is to be supported, if at all, upon the theory of estoppel. That this theory is inapplicable to the ordinary case of undisclosed principal is evident, because neither the principal nor the agent has by word or conduct made any representation upon which the third party had reason to rely and which must be repudiated in order that the principal shall not be held liable upon the contract.[13] It would seem, therefore, that since the facts necessary to constitute an estoppel are wanting, the rule that the principal is liable upon all contracts made within the apparent scope of his agent's authority would lose its justification where the fact of the agency is not disclosed. In arriving at the opposite conclusion, the English Court[14] has failed to apply the rule with due regard to its underlying principles and, although the result may perhaps be in accordance with the conception of justice and policy which supports the general liability of the undisclosed principal, the decision is insupportable upon strict theory.

RIGHTS OF A MORTGAGEE AGAINST A GRANTEE WHO ASSUMES PAYMENT OF THE MORTGAGE DEBT.—In determining the principles upon which to base the rights of a mortgagee against one who, upon a conveyance of the mortgaged premises, assumes payment of the mortgage debt, the courts are not in accord. Thus, in some jurisdictions the mortgagee may proceed directly against the grantee at law,[1] while in others he is permitted to avail himself of the promise only by way of the equitable doctrine of subrogation.[2]

The former of these views being a direct application of the doctrine which allows a third person to sue on a contract, although he is a stranger both to the promise and to the consideration, finds no justification, whatever the true theory of assumpsit,[3] in the law of pure contracts, and with a single exception, long since overruled,[4] this has always been recognized in England.[5] In this country, however, probably because of the influence exerted by arguments of justice and expediency,[6] the courts, excepting only those of Massachusetts,[7] recog-

[13]"In making the contract the agent has said: 'I am responsible.' This is not a misrepresentation; he is responsible." 9 COLUMBIA LAW REVIEW 121.

[14]Kinahan *v.* Parry *supra;* Watteau *v.* Fenwick *supra; cf.* Daun *v.* Simmons (1879) 41 L. T. 783.

[1]Kramer *v.* Gardner (1908) 104 Minn. 370; Dean *v.* Walker (1883) 107 Ill. 540; Gifford *v.* Corrigan (1889) 117 N. Y. 257.

[2]Keller *v.* Ashford (1890) 133 U. S. 610.

[3]Wald's Pollock on Contracts (3rd ed.) 241; Ames, History of Assumpsit 2 Harv. L. Rev. 14; Langdell, Summary of Contracts §§ 45, 46, 63.

[4]Dutton *v.* Poole (1677) 2 Lev. 210; Tweddle *v.* Atkinson (1861) 1 B. & S. 392.

[5]Price *v.* Easton (1833) 4 B. & A. 433; *In re* Chemical Co. (1883) L. R. 25 Ch. D. 103.

[6]Professor Williston in Wald's Pollock on Contracts (3rd ed.) 242.

[7]Bank *v.* Rice (1871) 107 Mass. 37; Mellen *v.* Whipple (Mass. 1854) 1 Gray 317; Marston *v.* Bigelow (1889) 150 Mass. 45; Borden *v.* Boardman (1892) 157 Mass. 410. But see Bank *v.* Insurance Co. (1896) 166 Mass. 189.

nize in a third party a definite contractual right flowing from an obligation undertaken for his benefit.[8] In reaching this result, the courts attempted to bring the beneficary's anomalous position into conformity with the only relation for which principle and precedent had hitherto made provision, and consequently it was necessary to resort to forced analogies and outright fictions.

Out of the confusion necessarily resulting, there emerges, nevertheless, at least one principle that is commonly followed: the promise must be made primarily,[9] if not solely,[10] for the third person's benefit. To determine this question, two tests have been adopted. The one more frequently employed requires that the promisor undertake to perform a legal obligation[11] which is owing by the promisee to the beneficiary.[12] Obviously, this test is based on a misconception of the real intent of the contracting parties which was to protect the obligee rather than to benefit a stranger. The other seems the more reasonable, and therefore the preferable test in that it declares that the promise is made with the third party's advantage as its prime purpose only when the promisee owes him no duty.[13]

By an application of the former of these tests the majority of the court in the case of *Hoeldtke* v. *Horstman* (Tex. 1910) 128 S. W. 642 allowed the mortgagee, as a beneficiary, to recover directly from the grantee on his promise to pay the mortgage debt. In determining the further question as to when the contracting parties could deprive the mortgagee of this right, it was decided that although no right vested in the beneficiary until he accepted the promise, yet thereafter it could not be devested without his consent. This conclusion is in accord with the weight of authority.[14] Since, however, no act of a stranger can change the nature of a contract, to require his acceptance is opposed to sound principle, which demands that the beneficiary gain his right immediately upon the consummation of the contract.[15] Upon the theory adopted the decision is undoubtedly correct.

A different result was reached by the minority of the court, which, dissenting from the obvious unreality involved in declaring the grantee's promise to have been made primarily for the benefit of the mortgagee, contended that since the latter was entitled only to the

[8]Cobb *v.* Heron (1899) 180 Ill. 49; Imboden *v.* Caughron (1885) 46 Ark. 132; Starbird *v.* Cranston (1897) 24 Colo. 20; Joslin *v.* Car Co. (1873) 36 N. J. L. 141.

[9]Lumber Co. *v.* Miller (1896) 28 Ore. 565; Wright *v.* Perry (1887) 23 Fla. 160; Larson *v.* Cook (1893) 85 Wis. 564.

[10]Trust Co. *v.* Coal Co. (1899) 95 Fed. 391. But see Baxter *v.* Camp (1898) 71 Conn. 245.

[11]Montgomery *v.* Rief (1897) 15 Utah 495; Buchanan *v.* Tilden (1899) 158 N. Y. 109; Jefferson *v.* Asch (1893) 53 Minn. 446.

[12]Lawrence *v.* Fox (1859) 20 N. Y. 268; Vrooman *v.* Turner (1877) 69 N. Y. 280.

[13]Bank *v.* Grand Lodge (1878) 98 U. S. 123; Adams *v.* Kuehn (1888) 119 Pa. 76; Meech *v.* Ensign (1881) 49 Conn. 191.

[14]Copeland *v.* Summers (1894) 138 Ind. 219; Wheat *v.* Rice (1884) 97 N. Y. 296; Huffman *v.* Mortgage Co. (1896) 13 Tex. Civ. App. 169; Trimble *v.* Strother (1874) 25 Ohio St. 378.

[15]Bay *v.* Williams (1884) 112 Ill. 91; Rogers *v.* Gosnell (1875) 58 Mo. 589.

right of subrogation, he could maintain no action whatsoever, as the contract had been rescinded by its makers. The doctrine of subrogation thus advocated is applied to a situation of this kind on the theory that, as between themselves, the grantor is in equity a mere surety, while the grantee, though not directly liable to the mortgagee,[16] is the principal debtor. Undoubtedly, the relation of principal and surety may be created by operation of law,[17] yet to establish it when the principal debtor owes nothing to the creditor is an extension perhaps unwarranted by the principles of suretyship, and its rules afford no justification for a practice which permits the obligors to destroy the principal's contract without the consent of the creditor.

Rigid rules of law, however, play but little part in this doctrine which is based entirely on equitable considerations.[18] Because of his possession of the land[19] or his promise to pay the mortgage debt, having deducted an amount of the purchase price sufficient for that purpose,[20] equity regards the grantee as primarily liable. Since in chancery the relation of principal and surety may be established by agreement and the arrangement of the equities among debtors, even without the knowledge of the creditor,[21] the reason for considering the grantee as a mere surety is apparent. Furthermore, as a result of the well-established rule that a creditor is, in equity, entitled to the benefit of all collateral rights which the conventional surety, or one in a similar situation, has against his principal,[22] it follows that the mortgagee should be subrogated to the claims that the grantor holds against the grantee. According to the doctrine as commonly announced, however, this privilege is extended to the mortgagee, not because of a legal right or because of any equities vested in him, but only by virtue of a rule of procedure to prevent circuity of action and unnecessary annoyance to the grantor, in whom all the equities are considered to reside.[23] In view of this, the parties may logically be allowed to rescind the contract before the mortgagee has filed a bill to foreclose or has so altered his position in reliance on the promise as to shift the equities,[24] and it is generally so held.

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[16]Keller *v.* Ashford *supra.*

[17]Wilson *v.* Lloyd (1873) L. R. 16 Eq. Cas. 60.

[18]Josselyn *v.* Edwards (1877) 15 Ind. 212; 3 COLUMBIA LAW REVIEW 199.

[19]Stevenson *v.* Black (N. J. 1831) Saxton 338.

[20]3 Pomeroy, Eq. Jur. § 1206.

[21]Smith *v.* Shelden (1876) 35 Mich. 42.

[22]Kramer and Rahm's Appeal (1860) 37 Pa. 71; Curtis *v.* Tyler (N. Y. 1842) 9 Paige 432.

[23]Crowell *v.* Hospital (1876) 27 N. J. Eq. 650.

[24]Spence, Eq. Jur. 280; Crowell *v.* Currier (1876) 27 N. J. Eq. 152. But see 3 Pomeroy, Eq. Jur. § 1206, note 3, where it is argued that the mortgagee cannot logically be deprived of his right to subrogation without his consent, on the assumption that such a right is a vested one.